Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

VIDEO VISIONS, INC.; VIDEO STUDIO, INC.; FACIT PROPERTIES, INC.,

Petitioners,

vs.

STATE OF OHIO, ex rel. ROBERT L. KONSTAM,

Respondent.

Petition For Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a state statute which requires the closure of premises where a nuisance is found to exist and forfeiture of personal property used in the nuisance, unconstitutional as applied under the First and Fourteenth Amendments when the statute is used by a municipality to padlock a video arcade situated in a bookstore as a pretext to suppress constitutionally protected speech--the question reserved by this Court in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)?

II. Where it is established that an action under such a nuisance statute is being prosecuted by a municipality as a pretext for closing a bookstore and video arcade because of the sexually explicit but constitutionally protected expression offered there, do the First and Fourteenth Amendments require that such a demonstra-

tion of pretext be recognized as a complete affirmative defense to the action?

III. In such a case, do the First and Fourteenth Amendments, at a minimum, require that any remedy ordered to abate the nuisance be more sensitive to free speech rights than outright closure of a video arcade situated in the bookstore and forfeiture of the personalty in the arcade?

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VIDEO VISIONS, INC.; VIDEO STUDIO, INC.; FACIT PROPERTIES, INC.,

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STATE OF OHIO, ex rel. ROBERT L. KONSTAM,

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Petition For A Writ of Certiorari To
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PETITION FOR A WRIT OF CERTIORARI

Video Visions, Inc., Video Studio, Inc. and Facit Properties, Inc.,[1] petitioners, pray that a writ of certiorari issue to review the judgment of the Ohio Supreme

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[1] The three corporate petitioners have no parent or subsidiary companies. Rule 29.1, Supreme Court Rules.

Court entered in this case on September 28, 1994.

OPINIONS BELOW

The order of the Ohio Supreme Court dismissing the appeal for the reason that no substantial constitutional question exists is set forth at A1. The Opinion of the Court of Appeals for Richland County, Ohio, Fifth Appellate District is set forth at A3. The Judgment Entry of the Court of Appeals for Richland County, Ohio, Fifth Appellate District is set forth at A28. The Final Judgment Entry of the Court of Common Pleas of Richland County, Ohio is set forth at A30. Other judgment entries and orders of the Court of Common Pleas of Richland County, Ohio are set forth at A35.

JURISDICTION

The final judgment of the Court of Common Pleas of Richland County, Ohio was entered on April 19, 1993. A30. The judgment of the Court of Appeals for Richland County, Ohio was entered on April 28, 1994. A28. The judgment of the Ohio Supreme Court was entered on September 28, 1994. A1. This Court has jurisdiction to review the judgment rendered by the highest court of a state by writ of certiorari, pursuant to 28 U.S.C. § 1257, where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution and the Ohio

Public Nuisance Statutes, Chapter 3767 et seq., are reprinted in the Appendix to this petition at A64 through A76.

STATEMENT OF THE CASE

This case stands as a textbook example of the censorial use of a nuisance statute foreshadowed and condemned by this Court in Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172 (1986).

It, in fact, strikes dead center at the First Amendment issue left open by this Court in Arcara: when a state nuisance statute has been used as a pretext to shut down a business distributing and displaying constitutionally protected sexually explicit materials in order to suppress expression, what is the constitutionally mandated remedy?

With the increasing reliance on state nuisance statutes to control and restrict

businesses engaged in the distribution of sexually explicit materials[2], the need for

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[2] In Ohio alone, within the past several years, at least eight nuisance actions have been filed against businesses engaged in the distribution of constitutionally protected sexually explicit speech in addition to the case at bar. See State of Ohio ex rel. Miller v. The Lions Den, Inc., et al., Case No. 89CV-12-9008 (Franklin Cty. Com. Pl., December 1989); State of Ohio ex rel. Miller v. Lions Den Bookstore, et al., Case No. 89CV-12-9007 (Franklin Cty. Com. Pl., December 18, 1989) aff'd in part, rev'd in part Case No. 90-AP1056 (Franklin Cty. App. 1991); State of Ohio ex rel. Miller v. Rear Door Bookstore, et al., Case No. 89CV-12-9005 (Franklin Cty. Com. Pl., December 18, 1989) aff'd Case No. 90AP-986 (Franklin Cty. App., March 21, 1991) aff'd 63 Ohio St. 3d 354 (1992); State of Ohio ex rel. Miller v. Zodiac Bookstore, et al., Case No. 89CV-12-8009 (Franklin Cty. Com. Pl., December 18, 1989); State of Ohio ex rel. Miller v. Worldwide Bookstore, Case No. 89CV-12-9011 (Franklin Cty. Com. Pl., December 18, 1989); State of Ohio ex rel. Miller v. Disco Bookstore, Inc., et al., Case No. 89CV-12-9012 (Franklin Cty. Com. Pl., December 18, 1989); State of Ohio ex rel. Miller v. Trabue Road Adult Bookstore, Case No. 89CV-12-9010 (Franklin Cty., December 18, 1989); State of Ohio ex rel. Becker v. Lions Den Bookstore, et al., Case No. 90-S-89086 (Licking Cty. Com. Pl., December 11, 1990). Each case resulted in the closure of the store and the forfeiture of per-

a resolution to this issue has precipitously grown. Petitioners now seek an answer to the question left unresolved in Arcara.

On December 29, 1992, respondent, the State of Ohio, ex rel. Robert L. Konstam, initiated a nuisance abatement proceeding pursuant to Ohio Revised Code § 3767.01 et seq. against Video Visions, Inc., Video Studio, Inc., Facit Properties, Inc., Robert E. Rice, Timothy E. Bush, Wendy K. Dick and Philip Kasper[3] seeking to close down the bookstore and video arcade operating under the name Video Visions. The Common Pleas Court of Richland County immediately issued an ex parte temporary restraining order prohibiting the peti-

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sonalty.

[3] Judgment against the four individual defendants was vacated by the court of appeals.

tioners from removing or interfering with the personal property or contents of the premises on which Video Visions was located.

From the advent of the proceedings to their denouement, petitioners vigorously asserted that the nuisance action had been instituted for the singular and express purpose of suppressing the constitutionally protected sexually explicit expression being distributed and viewed at Video Visions. Petitioners diligently briefed these constitutional issues and adduced evidence in support to demonstrate the unadulterated pretextual nature of the action.

Nevertheless, following a hearing, the trial court continued the restraining order and ordered petitioners to close the video arcade portion of the Video Visions store (which comprises approximately three-fifths

of the premises), to refrain from removing any property from the video arcade area, to bar the public from the video booths located in the arcade area, and to prohibit the public from using the premises for the purposes of masturbation.

A permanent injunction hearing was subsequently held. The trial court issued a permanent injunction and order of abatement. The judgment enjoined the petitioners from maintaining the nuisance found by the Court to exist, ordered that the property and contents of the video arcade area be sold at public auction, ordered the video arcade area closed for one year, prohibited petitioners from setting up pay-for-view video booths anywhere else in the store, imposed a $300.00 tax upon Video Studio, Inc., and ordered petitioners to pay the costs of the action.

Petitioners appealed to the Court of Appeals for Richland County raising, inter alia, the First Amendment issues presented by the pretextual nuisance action.

Addressing petitioners' First Amendment claims, the court of appeals began: "Appellants [Video Visions, Inc., et al.] produced overwhelming evidence that the nuisance investigation against Video Visions was pretextual in nature." Ct. of App. Op. at 7, A15.

Although the court acknowledged that petitioners established that the nuisance statute had, indeed, been used as a pretext for suppressing constitutionally protected expression, the court rejected petitioners' arguments regarding the appropriate remedy. The court refused to strike down the nuisance statute as unconstitutional and refused to dismiss the complaint against petitioners. And although the appellate

court purported to apply the First Amendment analysis set forth in United States v. O'Brien, 391 U.S. 367 (1968), the court refused to reverse on the ground that closure of the arcade portion of the store was not a remedy narrowly tailored to relieve the incidental restriction of First Amendment rights.

Petitioners appealed to the Ohio Supreme Court. On September 28, 1994, the Ohio Supreme Court declined review for want of a substantial constitutional question.

Petitioners seek review by writ of certiorari from this Court.

STATEMENT OF FACTS

Video Visions is a retail establishment located in the City of Mansfield, Ohio, which sells, rents, and displays sexually oriented books, magazines and videotapes protected by the First Amendment. The store

itself is divided into three separate areas. The front section of the store offers general interest magazines of all kinds for sale, and the middle section offers sexually oriented books, magazines and videotapes, as well as novelty items, for sale. The rest of the store comprising approximately three-fifths of the premises is a video arcade area which is at the heart of the instant controversy.

The arcade area contains a number of video booths in which, for a small fee, patrons can watch various kinds of sexually explicit videotapes. The arcade area is separate from the front two portions of the store in that the customer enters through a doorway and is required to purchase $2.00 worth of tokens prior to admission into the arcade area.

Since Video Visions opened in 1989, the store has been the subject of an ongoing

controversy. Various vocal citizens, including a city council person, have delivered harangues regarding the sexually explicit content of the materials offered for viewing and distribution at the store. In response to the criticism of the store, the Law Director's office initiated several criminal prosecutions against petitioners in addition to the civil nuisance action here at issue.

The battle began in 1990, when the City of Mansfield prosecuted Video Visions and several of its employees for pandering obscenity. The city alleged that various sexually explicit videotapes offered for sale or view at the store were obscene. After lengthy court proceedings, judgments

of acquittal were entered in favor of all defendants.[4]

The 1990 cases generated a significant amount of publicity in the City of Mansfield. The events were reported on television, radio and in the local newspapers. The acquittals were the subject of great criticism by a group of community members opposed to the sale of sexually explicit materials.

At the crest of the opposition was Mansfield Councilwoman-at-large Pat Brooks. Brooks spearheaded Mansfield's fight against pornography in general, and Video Visions in particular. She made public comments indicating her disapproval of Video Visions because she found sexually

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[4] A declaratory judgment action had also been initiated against another video store based on the alleged obscenity of two sexually explicit videotapes. That case resulted in a hung jury. Not insignificantly, that store moved out of Mansfield.

explicit material objectionable. She publicly expressed her belief that such materials should not be available in the Mansfield Community and that Mansfield was "soft on smut." Brooks vowed to "garner the mayor's support to encourage the police department to pursue an aggressive investigation against Video Visions," and held a public meeting at which some 200 vocal members of the area were present. During that meeting she congratulated the public "for getting a jump on National Antipornography Awareness Week" and requested "community involvement to fight the destructiveness of pornography."

Under this pressure, Mansfield recruited outside experts in the anti-pornography movement to help identify and employ measures to force adult bookstores like Video Visions from the city.

One of the experts, Phil Buress, the President of an organization called Citizens for Community Values, was invited to speak at a Mansfield City Council meeting. Mr. Buress attended a meeting of the city council in September of 1992 and, during the meeting, showed a videotape demonstrating how the antipornography movement has operated in other communities. Buress addressed the council and advocated that Mansfield fight adult video and book stores by rallying local citizens to support the law enforcement agencies in ousting the stores from the community through state laws. After the meeting, the Mayor announced that he would re-evaluate whether sexually explicit materials ought to be available in the community. Thereafter, and in response to Mr. Buress' suggestions, as well as at council's request, the City Law Director drafted a Resolution on behalf

of the city council which expressed the city's views on the availability of sexually explicit materials in the community.

Resolution #92-229, presented to council and passed by a unanimous vote, articulates the Mansfield City Council's opposition to the sale of sexually explicit materials in the community. A80. The resolution reads, in part:

> A Resolution by Council to support that aggressive investigation and legal action be taken by the Mansfield Police Department and the Director of Law against the sale of "hard-core" pornographic materials in the City of Mansfield which are "obscene" by definitions set forth in decisions handed down by the United States Supreme Court and the Ohio Revised Code.
>
> * * * *
>
> WHEREAS, there are presently available, for sale, in commercial establishments in the City of Mansfield "hard-core" pornographic materials depicting sexual conduct as defined and prohibited in the Ohio Revised Code, which "hard-core" pornographic materials shall henceforth

be described herein as "materials,"....

* * * *

SECTION 2. That the Director of Law be, and he is hereby, requested to zealously pursue, either civilly or criminally, the sale of these materials in our community, which, in his judgment, are in violation of law.

SECTION 3. That the Director of Law be, and he is hereby, empowered and authorized by this Council to prosecute in the name of the City of Mansfield, Ohio, such civil actions either in nuisance, declaratory judgment, or other as he deems necessary in his judgment to carry out the expression of intent of this Council set forth in this Resolution.

Council's passage of the anti-pornography resolution was noteworthy because it directly targeted Video Visions--despite the fact that Video Visions and its employees had been acquitted, not convicted, of pandering obscenity. The resolution was based, however, on the incorrect premise that all sexually explicit expression is obscene. Therefore, the resolution effec-

tively charged the Law Director with the duty of zealously ridding the city of all sexually explicit expression whether constitutionally protected or not. The city had taken aim and Video Visions was in its sight.

Indeed, Councilwoman Brooks made no pretense about her objectives. In remarks made when she introduced the resolution, she stated:

> I have two things. I will be giving Mayor Scott a request tonight to proclaim October 25 through November 1 as National Anti-Pornography Week. Second, two, three, four, maybe six months from now, I want this Administration, the Law Director, the Mansfield Police Department, and City Council, to remember the two hundred people who were here last night, who packed this chamber in opposition to pornography. I want the Mayor to be accountable to the citizens for his promise to aggressively combat pornography in Mansfield. The Law Director has received the direction that he has been asking for, by way of the people, the Mayor, and hopefully, tonight, by City Council. The police, who we were told, needed direction from the

> Mayor, now have that direction. This has to be a joint effort. If the Law Director needs two more tapes purchased and the police won't do it, see the Mayor. If the Police Department wants legal advice and don't receive it, see the Mayor. Let's not pass the buck. Let's co-operate and let's make Mansfield a place with high standards. If Mr. Konstam needs two hundred people at the Court House to back him up, see me. We will mobilize the troops because as there is a war against drugs, there should also be a war against pornography.

(Emphasis added.)

The City Law Director acknowledged that Video Visions was Ms. Brooks' primary concern and conceded that soon after the Resolution passed, he met with the Chief of Police, the Mayor and the Service/Safety Director to ponder their strategy. The resolution was considered only the "beginning to the fight."

Immediately thereafter, the police began a "pornography" investigation of Video Visions, which continued through December

1992. No other retail outlet was investigated. The investigating officers testified they were initially directed to go to Video Visions, purchase tokens, walk through the arcade area and make observations. Later, they were ordered to collect evidence of sexual activity from the arcade's viewing booths. The officers entered the premises on five occasions and collected fluid samples, most of which contained the presence of semen from several of the video booths. This evidence, respondent maintained, demonstrated that some patrons were masturbating while viewing the videos. It was this patron misconduct, respondent alleged, which constituted a nuisance under § 3767.01, et seq. Ohio Rev. Code.

Lieutenant Goldsmith, who headed the police investigation, acknowledged that the evidence they gathered was intended for a

potential civil nuisance action against the store which could result in it being "boarded up." As a result of the investigation and consistent with the City Council Resolution #92-229, the Law Director initiated this nuisance action to close down the store.

On November 3, 1992, and as part of the same investigation, the Law Director also initiated nine criminal pandering obscenity charges against the petitioners. These nine complaints were dismissed by respondent in December 1992 as a result of defects in the charging instruments. However, on December 30, 1992, the day after the nuisance complaint was filed, the nine dismissed complaints were replaced by 19 new criminal pandering obscenity complaints against the same individuals and entities.

The 19 new criminal charges were consolidated into five groups. Five trials

were scheduled. Two trials actually went forward. See 93-CRB-4477 through 92-CRB-4495 in the Mansfield Municipal Court.

The first trial resulted in a Criminal Rule 29 acquittal, and the second resulted in a jury acquittal of all defendants. The respondent dismissed the remaining pending criminal complaints for the reason that a jury had found similar materials were not obscene. See Motion to Dismiss and Order of Dismissal in 92-CRB-4481, 4488, 4490-4495.

Additional steps against Video Visions' sale of sexually explicit material were also being pursued. At the same time the "pornography" investigation was beginning, the Law Director continued working with "out of town experts in the obscenity field who offer advice to communities dealing with pornography problems." The result was the drafting of an "open booth" ordinance identical to the one upheld in Bamon Corp.

v. City of Dayton, 923 F.2d 470 (6th Cir. 1991), and designed to eliminate the potential for patron sexual misconduct while viewing videotapes in an arcade.

The ordinance which was passed on December 15, 1992, required the arcade area of Video Visions to be significantly modified. Although the ordinance was not due to take effect for a period of time, Video Visions began to take steps to comply with the ordinance by taking doors off of the video booths.

Some members of council expressed frustration with the open booth ordinance because it would not achieve the real goal of preventing the distribution of sexually explicit materials in the community. See Defendants' Exhibit 8 ("This really didn't do what the original focus was;")("What's the holdup in the legislation to close up this place?")("What we will have here to my

idea is a whole lot of noise and nothing doing at the end."). In addition, the Law Director publicly commented that the legislation "would send such businesses a message. 'It might make some sense to tell them on the front end that it's not going to be easy to do business in our community.'"

Less than two weeks after the open booth ordinance passed, the respondent filed this nuisance action for the ostensible purpose of preventing the sexual misconduct of arcade patrons. The reality, however, is that the lawsuit was filed for the purpose of taking an additional step toward the overall plan of ridding the City of sexually explicit materials.

Thus, since 1990, the respondent has litigated three criminal cases against the Video Visions store and its employees, each ending in acquittal; has passed a Resolu-

tion ordering the police to take whatever action they can to eliminate the sale of sexually explicit materials from the community; has passed an "open booth" ordinance in an effort to regulate businesses in the community who offer to sell or rent sexually explicit materials; has participated in a "pornography" investigation of Video Visions, which continued through December 15, 1992, the same day the open booth ordinance was passed; and finally, two weeks later and without gathering additional evidence establishing the continuation of patron misconduct, filed the instant nuisance action to close down the store.

The conclusion that the nuisance action shutting down Video Visions' arcade was instituted for the purpose of suppressing sexually explicit expression simply cannot be escaped. The court of appeals below

found the evidence overwhelming. The issue, therefore, squarely before this Court is what is the appropriate remedy afforded a defendant in a pretextual and unconstitutionally motivated nuisance action?

REASONS FOR GRANTING THE WRIT

Over the past several terms, this Court has grappled with issues centered on the friction between freedom of speech and government regulation. It has been attentive to the task of drawing boundaries to achieve an equipoise between the First Amendment and the government's objective of efficient governance. See Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878 (1994)(extent of First Amendment protection accorded government employee's speech); Alexander v. United States, ___ U.S. ___ 113 S.Ct. 2766 (1993) (whether criminal sanctions can be levied despite their

effect on suppressing speech); Barnes v. Glen Theatre, Inc., ___ U.S. ___, 111 S.Ct. 2456 (1991)(whether state can pass law regulating nudity despite statute's effect of restricting expressive activity); F.T.C. v. Superior Court Trial Lawyers Assoc., 493 U.S. 411, 110 S.Ct. 768 (1990)(whether antitrust law can be applied to boycott having expressive component). This case is not a boundary-drawing case. The boundary was drawn and set eight years ago in Arcara v. Cloud Books, Inc. 478 U.S. 697, 106 S.Ct. 3172 (1986). Rather, the question that begs to be answered here is what happens when government has improperly crossed the boundary? Specifically, what is the remedy in the context of a civil nuisance action when it is established that the government has initiated otherwise proper proceedings as a pretext for suppressing constitutionally protected speech?

In Arcara v. Cloud Books, 478 U.S. 697 (1986), this Court addressed the issue whether the First Amendment was offended by application of a New York statute authorizing closure of a building for being a public health nuisance to an adult bookstore where prostitution and other public sexual conduct between patrons was alleged to be occurring. Id. The New York Court of Appeals had held application of the statute to close the store would result in the unconstitutional imposition of a prior restraint on materials presumptively protected by the First Amendment. Id. In doing so, the Court of Appeals found the nuisance statute's application to the bookstore would not comply with the standard set forth in United States v. O'Brien, 391 U.S. 367 (1968), which requires strict scrutiny of a regulatory statute incidentally inhibiting the dissemin-

ation of constitutionally protected expression to determine whether the restriction on First Amendment freedoms "is no greater than is essential to the furtherance of [the statute's] interest." 391 U.S. at 377. This Court reversed the decision of the New York Court of Appeals and held O'Brien was not applicable because the statute "was directed at unlawful conduct having nothing to do with books or other expressive activity." Id. at 706. It found that application of the statute was constitutional since closure was necessary to prevent prostitution, a criminal act which neither raised nor implicated expression protected by the First Amendment. Id. at 707.

In addressing the issue, all Justices who concurred in the decision acknowledged the existence of a critical distinction between application of a nuisance statute

to close down premises where criminal activity was taking place and using it as a means to close down premises because of hostility toward the sexually explicit expression being disseminated therein.

Arcara was a 6-3 decision. Chief Justice Burger wrote a plurality opinion in which three Justices joined, and Justice O'Connor wrote a concurring opinion in which Justice Stevens joined. Id. The votes of Justices O'Connor and Stevens were essential to the outcome of the case. Both opinions, the plurality's and Justice O'Connor's, recognize that if it were established that a nuisance action were being used as a pretext to suppress speech, the analysis would change and the outcome might be different. Chief Justice Burger wrote for the plurality:

> Respondents assert that closure of their premises is sought as a pretext for suppression of First

> Amendment protected expression. However, there is no suggestion on the record before us that the closure of respondents' bookstore was sought under the public health nuisance statute as a pretext for the suppression of First Amendment protected materials. Were respondents able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution. See Wayte v. United States, 470 U.S. 598, 105 S. Ct. 1524, 84 L.Ed.2d 547 (1985).

478 U.S. at 708 n.4 (emphasis added).

And Justice O'Connor similarly wrote:

> If ... a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.

478 U.S. at 708 (O'Connor, J. concurring) (emphasis added).

Thus, both the plurality and concurring opinions in Arcara recognized that a show-

ing of pretext considerably altered the equation in analyzing a nuisance statute's effect on First Amendment rights.

I.

CHAPTER 3767, OHIO REV. CODE, IS UNCONSTITUTIONAL AS APPLIED WHERE, APPLYING A FIRST AMENDMENT STANDARD OF REVIEW TO A CASE WHERE A NUISANCE COMPLAINT WAS INITIATED AS A PRETEXT FOR THE PURPOSE OF PREVENTING THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION, THE RESULT IS A PRIOR RESTRAINT ON THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION.

The appellate court held that First Amendment analysis is appropriately applied to a situation where pretext is established. However, it went on to find the nuisance statute was not unconstitutional as applied to petitioners under the test set forth in United States v. O'Brien, 391 U.S. 367 (1968).

Petitioners maintain, however, when Chapter 3767's application to Video Visions

is tested under the analysis required by O'Brien, the statute is clearly unconstitutional. In United States v. O'Brien, 391 U.S. 367 (1968), this Court determined that when a governmental regulation affects conduct not necessarily possessing an expressive element, but which occurs in combination with constitutionally protected expression, the regulation must be strictly scrutinized to assure that "the incidental restrictions on alleged first amendment freedoms is no greater than is essential to the furtherance of the statute's goals." Id. at 377 (emphasis added).

Section 3767.06 of the Ohio Revised Code provides in pertinent part that:

> If the existence of a nuisance is admitted or established ... an order of abatement shall be included in the judgment.... The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting or maintaining the nuisance ... and shall

> direct that the personal property or contents that belong to the defendants notified or appearing be sold, without appraisal, at a public auction to the highest bidder for cash. The order also ... shall continue for one year any closing order issued at the time of granting the temporary injunction; or if a closing order was not then issued, shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year.

Application of the analysis required by O'Brien establishes that the statutory sanctions, which require complete closure of the arcade portion of the store and the confiscation and sale of all personal property, together with a permanent injunction enjoining the nuisance, impose a restriction on First Amendment freedoms far greater than was essential to abate the nuisance.[5] In fact, the closure order

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[5] This proposition was implicitly recognized in Arcara, 478 U.S. 697, 707 n.4 (1986), when Chief Justice Burger did not

prohibited Video Visions from disseminating protected expression for a fee from a video booth anywhere in the store. Thus, imposition of the statutory sanctions resulted in a wholesale prior restraint on the dissemination of expression never declared unlawful. As such, the statute's application to petitioners resulted in an unconstitutional infringement on their First Amendment rights.

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disagree that had the O'Brien analysis been appropriate, its application would have required the statute to be struck down. See also, Barnes v. Glen Theatre, Inc., ___ U.S. ___, 111 S. Ct. 2456, 2463 (1991) (Applying 4-part O'Brien test, Court found that statute was "narrowly tailored" in requiring dancers to wear pasties and a G-string as "bare minimum to achieve the State's purpose.").

II.

WHETHER OR NOT CHAPTER 3767 OHIO REVISED CODE IS FOUND UNCONSTITUTIONAL AS APPLIED, THE TRIAL COURT WAS REQUIRED TO ENTER JUDGMENT FOR PETITIONERS BECAUSE PROOF OF PRETEXT IS A COMPLETE DEFENSE TO THE NUISANCE COMPLAINT.

As noted above, the plurality and concurring opinions in Arcara acknowledged that a showing of pretextual use of a nuisance statute to suppress speech alters the analysis employed in Arcara and raises the issue as a potential defense.

Dismissal of charges is the constitutionally mandated remedy for proof of the selective prosecution defense referred to by Justice Burger. See Wayte v. United States, 470 U.S. 598 (1985); Yick Wo v. Hopkins, 118 U.S. 356 (1886). The remedy is applied despite the fact that the defendant may indeed by guilty of the misconduct with which he is accused. The same is true with other affirmative defenses such as

self-defense, insanity, excuse or justification. In each of these situations, judgment for the defendant is warranted even though the conduct which formed the basis for the complaint actually occurred. By analogy, where proof of the City's pretextual motivation in initiating a nuisance complaint is established, a similar analysis and result should be obtained.

Judgment must be entered in favor of the defense if the State is to be deterred from committing such misconduct in the future. If dismissal is not entered, the defense will be without a remedy in cases such as this where the proof of pretext is abundantly clear. Moreover, the failure to enter judgment in petitioner's favor will send a message to the government that it can utilize whatever improper methods it wishes in campaigning to suppress constitutionally protected material its public

officials find objectionable. Thus, dismissal as a remedy makes analytical sense as well as sound policy.

III.

WHEN IT IS ESTABLISHED THAT A NUISANCE COMPLAINT WAS INITIATED AS A PRETEXT FOR THE PURPOSE OF PREVENTING THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION, *UNITED STATES v. O'BRIEN* REQUIRES THAT ANY STATUTORY REMEDY MUST BE NARROWLY TAILORED TO IMPOSE THE LEAST RESTRICTION ON FIRST AMENDMENT RIGHTS.

Arcara requires that judgment be entered for the defense if it establishes that a city utilized a nuisance statute as a pretext for suppressing the dissemination of protected expression whether on the theory that the statute is unconstitutional as applied, or on the theory that pretext is a complete defense entitling the defendant to judgment as a matter of law. However, even if this Court determines that

pretext will not constitute a complete defense, at the very least, proof of pretext demands that any sanction imposed must be narrowly tailored to have the least possible intrusive affect on First Amendment freedoms.

The trial court's judgment in this case ordered closure of the entire arcade area of the Video Visions store which constituted three-fifths of the business premises. It also ordered that petitioners could place no more than one "video viewing facility" in the front area of the store "within clear sight of the sales counter," and further prohibited petitioners from charging a fee to patrons who used the "facility." See Judgment Entry and Permanent Injunction at 4.

The sanctions imposed by the trial court were not narrowly tailored to have the lease intrusive effect on First Amendment

freedoms. Rather, the orders issued by the trial court imposed a pervasive prior restraint upon the exhibition of constitutionally protected expression.

The court easily could have tailored its orders so that an unconstitutional infringement upon First Amendment freedoms would not have occurred. For instance, the court could have limited its order to an injunction enjoining petitioners from permitting the conduct from being repeated. If the court had limited its judgment to include such an order, petitioners would have had a duty to ensure that patrons did not engage in such conduct, and would have been accountable to the court for their failure to do so. Likewise, a judgment enforcing the City's open booth ordinance, which, with its specific provisions requiring that "the interior of the booth ...be visible from a well-lighted open and

continuous main aisle; [and] [n]ot be obscured by any door....," as well as its occupancy and lighting requirements, would have been fully adequate to eliminate the potential for patrons to engage in sexual misconduct. This too would have been less intrusive on First Amendment freedoms than the court's judgment ordering the arcade completely shut down.

Had the court ordered either of the two alternatives set forth above, the unconstitutional prior restraint, i.e., the total prohibition on Video Visions from exhibiting all constitutionally protected materials, sexually explicit or otherwise, on the premises for a fee, would not exist.

CONCLUSION

For all the foregoing reasons, petitioners respectfully urge this Court to

grant their petition for a writ of certiorari.

Respectfully submitted,

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THE SUPREME COURT OF OHIO

1994 TERM

To wit: September 28, 1994

STATE OF OHIO, ex rel. Robert L. Konstam, Appellee,	:	Case No. 94-1331
v.	:	
Video Visions, Inc., Video Studio, Inc., Facit Properties, Inc., Appellants,	:	E N T R Y
Robert E. Rice, Timothy P. Bush, Wendy K. Dick, Phil Casper.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Berkman, Gordon, Murray, Palda & DeVan.

(Richland County Court of Appeals; No. 93CA38)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel.	:	JUDGES:
ROBERT L. KONSTAM,	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Irene B. Smart, J.
v.	:	Hon. William B. Hoffman, J.
VIDEO VISIONS, INC.,	:	
VIDEO STUDIO, INC.,	:	Case No. 93-CA-38
FACIT PROPERTIES, INC.,	:	
ROBERT E. RICE,	:	
TIMOTHY P. BUSH,	:	
WENDY K. DICK,	:	O P I N I O N
PHIL CASPER,	:	
Defendants-Appellants	:	(Filed April 28, 1994)

CHARACTER OF PROCEEDING: Civil Appeal from the Richland County Court of Common Pleas, Case No. 92-751-D

JUDGMENT: Affirmed in part; reversed in part and modified

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellants

ROBERT L. KONSTAM
30 N. Diamond Street
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Gwin, P.J.

Defendants Video Visions, Inc., Video Studio Inc., Facit Properties, Inc., Robert E. Rice, Timothy P. Bush, Wendy K. Dick, and Phil Casper (appellants), appeal from the judgment entered in the Richland County Court of Common Pleas finding a portion of the business establishment known as Video Visions, located in Mansfield, Ohio, a "nuisance" as defined in R.C. § 3767.01.

Video Visions is a retail establishment best characterized as an "adult" bookstore that sells sexually explicit books and magazines with booths available for the viewing of sexually explicit movies. The establishment is divided into three separate areas. The front section of the store offers general interest magazines for sale. The middle section offers for sale sexually oriented books, magazines, video tapes, and novelty items. The rear portion of the

store is the video section containing twenty-two separate booths for viewing sexually explicit movies by placing twenty-five cent tokens in coin slots. One of four groups of movies is available in each booth, and each booth is color-coded to match the corresponding listing board. There are four groups of eight to ten movies each with various sexual orientation (e.g. heterosexual, homosexual, multiple partners, bondage, etc.) listed on color-coded boards. Two additional booths can be used to view movies selected from the front portions of the store.

The video portion of the store is separated from the front portions of the store by a wall and a door with a warning bell. The bell sounds when the door is opened to warn customers of the approach of another person. Each booth has a door that can be locked from the inside. Access to the

booths is restricted to those who purchase at least two dollars worth of tokens.

During October, November and December 1992, the Mansfield Police Department conducted an undercover investigation of the video store. On each visit to the store, officers gathered evidence which suggested that masturbation was occurring in the video booths. Seminal fluid was found on the walls of the booths, and in puddles on the floor of the booths. Kleenex and paper towels soiled with seminal fluid were also found within the booths. The trial court found this evidence clearly and convincingly established that each defendant knew of or acquiesced in the use of the video booths for masturbation purposes.

Plaintiff, Robert L. Konstam, Director of Law for City of Mansfield, filed a nuisance complaint against the owners and operators of Video Visions pursuant to R.C.

Chapter 3767 on December 29, 1992. The complaint alleged that Video Visions is a public nuisance as "lewdness, assignation or prostitution is conducted, permitted, continued or exists" on the premises.

R.C.§ 3767.01(C) defines "nuisance" to include "...any place in or upon which lewdness, assignation or prostitution is conducted, permitted, continued or exists...."

R.C. § 3767.06(A) provides, in pertinent part:

> If the existence of a nuisance is admitted or established in the civil action provided for in section 3767.03 of Revised Code... an order of abatement... shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting or maintaining the nuisance and not already released under authority of the court as provided in division (C) of section 3767.04 of the Revised Code and shall direct that the personal property or contents that belong to the defendants notified or appearing be sold, without appraisal, at

a public auction to the highest bidder for cash.

Upon the filing of the within complaint, the trial court issued an ex parte temporary restraining order prohibiting appellants from removing or interfering with the personal property or contents of the Video Visions adult bookstore. Thereafter, a hearing was held on the state's motion for temporary injunction and the court found by clear and convincing evidence that the video portion of the Video Visions store was a nuisance within the meaning of R.C. § 3767.01(C) as a place upon which lewdness is conducted and permitted. The court specifically found that the activity constituting "lewdness" or "nuisance" was the business practice of renting booths to members of the public to be used for masturbation. The court reaffirmed its previous temporary restraining order and en-

joined appellants from opening the video portion of the Video Visions store, removing property from the video portion of the store, allowing the public to utilize the video booths located in the store, and from allowing the public to use the premises for purposes of masturbation. A permanent injunction was subsequently entered, which judgment included an order of abatement. This judgment enjoined appellants from maintaining the nuisance found by the court to exist and ordered that the property and contents in the video arcade area be sold at public auction. It was further ordered that the video arcade be closed until March 10, 1994, prohibited appellants from setting up pay-for-view video booths anywhere else in the store, and imposed a three hundred dollar tax against each defendant jointly and severally. The trial court's order did permit

appellants to "setup no more than one video viewing facility in [the] front portion of the store, and it must be placed in an open area of the store within clear site of the sales counter." However, the court precluded appellants from charging customers for the use of that video booth. It is from this order of permanent injunction that appellants appeal and assign as error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR THE APPELLEE AND IN NOT DISMISSING THE COMPLAINT AND ENTERING JUDGMENT FOR APPELLANTS.

A. IN ARCARA V. CLOUD BOOKS, THE UNITED STATES SUPREME COURT RECOGNIZED "PRETEXT" AS A DEFENSE TO A NUISANCE COMPLAINT WHERE THE COMPLAINT IS INITIATED AGAINST AN ADULT ESTABLISHMENT FOR THE PURPOSE OF SUPPRESSING THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED MATERIALS, AND FURTHER RECOGNIZED THAT WHERE EVIDENCE OF PRETEXT IS SUBMITTED, THE COURT IS REQUIRED TO UTILIZE A FIRST AMENDMENT STANDARD OF REVIEW TO DETERMINE WHETHER THE NUISANCE STATUTE CAN BE CONSTITUTIONALLY APPLIED.

B. THE TRIAL COURT ERRED IN FAILING TO FIND O.R.C. CHAPTER 3767 UNCONSTITUTIONAL AS APPLIED TO APPELLANTS WHERE, APPLYING THE FIRST AMENDMENT STANDARD OF REVIEW REQUIRED BY UNITED STATES V. O'BRIEN, THE STATUTE FAILS THE FOURTH PRONG OF THE O'BRIEN TEST.

C. WHETHER OR NOT R.C. 3767 ET SEQ. IS FOUND UNCONSTITUTIONAL AS APPLIED, THE TRIAL COURT WAS REQUIRED TO ENTER JUDGMENT FOR APPELLANTS SINCE PROOF OF PRETEXT IS A COMPLETE DEFENSE TO THE NUISANCE COMPLAINT.

D. EVEN IF PRETEXT IS NOT FOUND TO BE A COMPLETE DEFENSE, THE COURT ERRED IN FAILING TO NARROWLY TAILOR ITS REMEDY TO THAT WHICH WOULD BE THE LEAST RESTRICTIVE UPON FIRST AMENDMENT FREEDOMS.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANT BECAUSE THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH THAT A NUISANCE EXISTED AT THE TIME THE COMPLAINT WAS INITIATED OR AT THE TIME THE INJUNCTION HEARING WAS HELD.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THE INDIVIDUAL APPELLANTS WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT ANY

OF THEM WERE GUILTY OF PARTICIPATING IN THE NUISANCE.

I

Through their first assignment, appellants maintain the trial court erred in failing to analyze the instant matter under appropriate First Amendment principles.[1] Unlike State ex rel. Roszmann v. Lion's Den (1993), 89 Ohio App.3d 775, appellants do not claim that such analysis is required because the nuisance action was "inextricably intertwined" with expression protected by the First Amendment. For it is well-settled that masturbation, fondling, fellatio, and solicitation of prostitution in an adult bookstore "manifests absolutely no element of protected expression." Arcara v. Cloud Books, Inc. (1986), 478 U.S. 697,

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[1] Appellants' claim that R.C. Chapter 3767 is unconstitutional is overruled upon the reasoning contained in State ex rel. Roszmann v. Lion's Den, (1993), 89 Ohio App.3d 775.

705; State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals (1992), 63 Ohio St.3d 354. Stated otherwise, the First Amendment cannot be used as a shield for "...obviously unlawful public sexual conduct." Paris Adult Theater I. v. Slaton (1973), 413 U.S. 49, 67. Instead, it is argued that First Amendment analysis is required herein because the purpose of the nuisance complaint filed by the City of Mansfield was "to completely and permanently close down Video Visions as a means of accomplishing the City's goal of suppressing Video Visions' continued dissemination of constitutionally protected expression in their community."

Appellants direct us to the separate concurring opinion in Arcara by Justice O'Connor, and joined by Justice Stevens, wherein she wrote:

> If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Arcara at 708.[2]

Appellants produced overwhelming evidence that the nuisance investigation against Video Visions was pretextual in nature. Evidence was submitted that the City of Mansfield had unsuccessfully attempted to obtain criminal pandering obscenity convictions against the three corporations and four individuals named herein on at least three separate occasions since 1990. It was admitted that the City

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[2] Appellants also direct us to footnote four of the majority opinion in Arcara that provided that if closure of the bookstore is sought as a pretext for suppression of First Amendment protected expression the bookstore might have a claim of selective prosecution. See Wayte v. U.S. (1986), 470 U.S. 598.

of Mansfield brought in "out of town experts in the obscenity field who offered advice to communities dealing with pornography problems." In fact, appellee admits that the nuisance investigation against Video Visions was instituted immediately after the Mansfield City Counsel passed resolution number 92-229 directing the Chief of Police and Law Director to fully investigate and institute such civil actions deemed necessary to fight "hard core" pornographic materials that are "obscene" by definition. In response to this evidence, the trial court wrote:

> [Appellants] argue at length that this nuisance action is a pretext to suppress books, magazines and videos which have not been demonstrated to be obscene, and therefore outside First Amendment protection. [Appellants] offered evidence that members of city council, the mayor and others have expressed a purpose to suppress sexually explicit materials in Mansfield.

> [Appellants] argue that the city law director seeks to use this nuisance statute to close their bookstore as part of the City's crusade without demonstrating the material to be obscene. The U.S. Supreme Court has warned Courts to be vigilant against such pretextual use of nuisance statutes to violate First Amendment rights. Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (fn.4) and 708.
>
> Whatever the city's ultimate goals, they do not affect the fact that a nuisance has been proven in this case. Furthermore, this court, in the exercise of its equitable jurisdiction to enjoin the nuisance, can tailor its order to abate only the nuisance which was demonstrated. It is not necessary to close the entire store to temporarily abate the nuisance nor to sweep too broadly against material not demonstrated to be outside First Amendment protection.

Although the trial court makes no specific finding that the instant nuisance action initiated by the City of Mansfield was an attempt to close the Video Visions Bookstore as a pretext for suppression of First Amendment protected expression, it

appears the trial court acknowledged the pretextual nature of the nuisance investigation in fashioning its order abating the nuisance. However, contrary to appellant's position, the pretextual nature of the nuisance action does not operate as a complete defense to the within action. Instead, as noted above, the pretextual use of the nuisance statute requires analysis under the appropriate First Amendment standard of review. For such analysis, we turn to United States v. O'Brien (1968), 391 U.S. 367, 376-77, wherein the court stated:

> This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we

> think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free speech; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Appellants do not contend the government has no substantial interest in protecting the public against nuisances or that it lacks the constitutional power to regulate that activity which meets the definition of public nuisance. Rather, appellants focus on the final prong of the O'Brien test contending the court imposed sanctions against Video Visions were not the least restrictive means of abating the nuisance so to limit its effect on First Amendment freedoms. The trial court's order abating the nuisance provided:

1. Pursuant to R.C. 3767.05(D), the appellants Video Visions, Inc., Video Studios, Inc., Facit Properties, Inc., Robert E. Rice, Wendy K. Dick, Tim Bush and Phillip Casper ("respondents" herein) and any other persons are permanently enjoined from maintaining this video booth nuisance at 1425 Park Avenue West in Mansfield, Ohio. The respondents are permanently enjoined from maintaining the same type of nuisance elsewhere.

2. Pursuant to R.C. 3767.06(A), all personal property and contents of the video arcade portion of the building (the rear room which encompasses approximately 3/5 of the store) at 1425 Park Avenue West (called "Video Arcade" herein) shall be removed for safekeeping and sale by the Richland County Sheriff or the Mansfield Police to a place designated by the City Law Director, Robert L. Konstam. This personal property and contents have previously been inventoried pursuant to this court's order in this case.

   Mr. Konstam shall advise the appropriate law enforcement officials of this order. This personal property and contents shall be sold, without appraisal, at a public auction to the highest bidder for cash pursuant to R.C. 3767.06(A). The auction of this property shall not be held earlier than 10 days after the date of this entry and only

after the holder of any liens on this property are notified of the contents of this entry. If the relator contends that it is inappropriate for any of this property to be sold, he shall file the appropriate request and justification for an alternative disposition.

3. NOTICE: General Electric Capital Corporation, P.O. Box 17990F, Jacksonville, Florida 32245 may claim some interest in this personal property. That corporation is hereby notified by copy of this entry that: R.C. 3767.06(B) provides that owners of unsold property personal property or contents seized under this nuisance statute shall appear and claim the personal property or contents within 10 days after this order of abatement is issued and prove to the satisfaction of the court its lack of any actual knowledge of the use of the personal property or contents in the conduct of the nuisance and that with reasonable care and diligence they could not have known of that use.

4. Pursuant to R.C. 3767.06(A), all proceeds from the sale of the personal property and contents ordered above shall be applied first to the payment of the costs incurred in prosecution of this action and the costs associated with the abatement and sale ordered above. Pursuant to that same section, any proceeds remaining from the sale after payments of these costs shall be de-

posited into the City of Mansfield treasury and credited to its general fund. If the Relator contends he is entitled to reasonable attorney fees or other litigation expenses as part of the costs described above, he shall promptly request and justify such fees and expense.

5. Pursuant to R.C. 3767.06(A), all the Video Arcade portion of the building at 1425 Park Avenue West is closed against its use for any purpose until March 10, 1994 unless sooner released, except that persons may pass through the room to the rear exit of the building in the event of an actual fire or other emergency. Respondents may keep the remainder of the store open to the public during this period. The Respondents may setup no more than one video viewing facility in this front portion of the store, and it must be placed in an open area of the store within clear sight of the sales counter. Any persons (other than a clerk of the store) using that video viewing facility may not be charged for its use and shall be observed at all times during that use by a clerk of the store.

We commend the trial court in its effort to tailor an effective remedy that would have the least restrictive effect on the

dissemination of First Amendment protected material but would abate the non-expressive sexual activity carried on in appellants' business. The trial court's order abating the nuisance did not order Video Visions to close its entire business. The order did not limit appellants' right to continue to sell, rent or otherwise distribute its sexually explicit books, magazines and video tapes. The order does not require appellants to remove all of their video booths. Instead, the order merely closed the video portion of the bookstore, which portion was designed and operated in such a manner as to induce and/or permit its customers to engage in sexual activity that constituted the public nuisance. Appellants claim less restrictive means were available which would have had a lessor (sic) effect on their First Amendment freedoms. One such example was the removal of the doors from

each video booth. We believe the layout of this store would preclude such a remedy from effectively abating the nuisance. While it is true that other remedies do exist, we believe the one fashioned by the trial court is the most effective means of abating the nuisance and has little effect on appellants' First Amendment freedoms.

However, we are troubled by one aspect of the trial court's order that no person may be charged for the use of the one remaining video booth. We find no rational relation between this order and the trial court's order that denies appellants the right to charge its customers for the use of the one remaining video booth. In all other respects, we affirm the trial court's order abating the nuisance.

Appellants' first assigned error is hereby overruled.

II

Through the second assignment, appellants maintain the state did not prove a nuisance existed on their business premises at the time the action was initiated. We disagree.

The record on appeal supports the trial court's finding that police officers visited the video portion of appellants' business from October 6 through October 29, 1992. On each visit, police observed evidence of masturbation in the video booths. On October 27, 1992, officers collected samples from eight of the twenty-two booths and found that seven of the eight samples contained semen. Officers also found a used condom in one booth. Inspections and collection of evidence by undercover officers on November 11, 1992 and December 15, 1992, confirmed the continued existence of the same conditions in the video booths.

The nuisance complaint in this matter was filed on December 29, 1992. From these facts, we find that the within action was instituted at the time the nuisance existed in appellants' business establishment.

Accordingly, we overrule appellants' second assigned error.

III

Through the third and final assignment, appellants maintain the State produced insufficient evidence to prove that they were individually guilty of participating in the nuisance. This assignment is well taken.

Although one or more of these individual employees of Video Visions must have had knowledge of and thereby participated in the nuisance, no evidence was presented to the trial court establishing which employees had such knowledge. Accordingly, the State failed to meet its burden of proof

with respect to these individual defendants.

We sustain appellants' third assigned error.

For the foregoing reasons, the judgment entered in the Richland County Court of Common Pleas, Ohio, is hereby affirmed in all respects except we hereby vacate that portion of the judgment ordering appellants not charge its customers for the use of the one remaining video booth located at the front window of appellants' place of business and we reverse that portion of the judgment entered against the individually named defendants.

By Gwin, P.J.,
Smart, J. and
Hoffman, J. concur.

/s/ W. Scott Gwin
/s/ Irene Balogh Smart
/s/ William B. Hoffman
JUDGES

WSG:clw 0412 0418

IN THE COURT OF APPEALS
FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. ROBERT L. KONSTAM,	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
v.	:	
VIDEO VISIONS, INC., VIDEO STUDIO, INC., FACIT PROPERTIES, INC., ROBERT E. RICE, TIMOTHY P. BUSH, WENDY K. DICK, PHIL CASPER,	:	CASE NO. 93-CA-38
Defendants-Appellants	:	(Filed April 28, 1994)

For the reasons stated in the Memorandum-Opinion on file, the judgment entered in the Richland County Court of Common Pleas, Ohio, is hereby affirmed in all respects except we hereby vacate that portion of the judgment ordering appellants not charge its customers for the use of the one remaining video booth located at the front window of appellant's place of business and we reverse that portion of the

judgment entered against the individually named defendants.

/s/ W. Scott Gwin
/s/ Irene Balogh Smart
/s/ William B. Hoffman
JUDGES

IN THE COMMON PLEAS COURT
OF RICHLAND COUNTY, OHIO

STATE OF OHIO, ex rel.: Robert L. Konstam,	:	Case no. 92-751-D
Plaintiffs	:	JUDGMENT ENTRY ON
v.		NUISANCE TAX ISSUE
Video Visions, Inc., et al.,	:	(Filed April 19, 1993)
Defendants	:	

On March 16, 1993, the Court issued its permanent injunction and order of abatement for the video arcade nuisance found in this case. The parties were permitted to subsequently brief the issue whether the nuisance tax provided by R.C. 3767.08 may be imposed on more than one person for the same nuisance. That issue is now ripe for decision.

R.C. 3767.08 provides, in part:

> Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against

> the person maintaining the same a tax of three hundred dollars.
>
> ...the county auditor ...shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed....

The court finds that the language of R.C. 3767.08 contemplates a single tax of $300 tax imposed on the nuisance and the property where the nuisance is located. The statute contemplates that this $300 tax may be imposed jointly on more than one person if more than one person is maintaining the nuisance. The first sentence quoted above talks (sic) a tax of $300 being imposed against the enjoined nuisance. There is one nuisance and one tax. The part of the second sentence quoted above talks about a tax imposed on the property where the nuisance is maintained and the persons maintaining it.

The statute accordingly contemplates that the single $300 tax can be imposed

upon (and presumably collected from) any or all the persons responsible for maintaining the nuisance.

According to the evidence received, Facit Properties, Inc. owned the premises when the nuisance was maintained, Video Visions, Inc. provided its trade name for the conduct of the nuisance, and Video Studios, Inc., owned and operated the business constituting the nuisance. The evidence does not show the nature of the involvement of the remaining 4 individual respondents in maintaining the nuisance. The three corporate respondents were sufficiently involved in the maintenance of this nuisance that the $300 tax can be assessed against all three ~~of~~ them, jointly and severally, rather than just against Video Studios, Inc.

It is therefore ordered and adjudged:

1. Paragraph 6 of this Court's 3-16-93 permanent injunction and order of abatement is amended to read as follows:

> 6. Pursuant to R.C. 3767.08, a $300 tax is hereby imposed jointly and severally on respondents Video Studios, Inc., Video Visions, Inc. and Facit Properties, Inc. Pursuant to R.C. 3767.08, this tax shall be applied to pay any deficiency in the costs of the action and abatement, after application of the proceeds of the sale of personal property. Pursuant to R.C. 3767.11(B), any remainder of the tax shall be paid to the county treasurer.

2. The Court's file shows General Electric Capital Corporation was served on March 22, 1993 by certified mail with a copy of this court's 3-16-93 entry and the notice contained in paragraph 3 of that entry. But General Electric Capital Corp.

has not made any effort known to the Court to appear and claim the personal property ordered seized by this Court.

3. The Clerk shall serve copies of this entry on attorneys Robert L. Konstam and J. Michael Murray, advising them of the date it was entered on the Court's journal.

/s/ James DeWeese
Judge James DeWeese

IN THE COMMON PLEAS COURT
OF RICHLAND COUNTY, OHIO

STATE OF OHIO, ex rel.:		
	:	Case no. 92-751-D
Plaintiff	:	
	:	PERMANENT INJUNC-
v.		TION ORDER AND OR-
		DER OF ABATEMENT
Video Visions, Inc.,	:	
et al.,	:	
	:	(Filed March 16,
Defendants	:	1993)

On March 10, 1993, this case came on for trial of the permanent injunction. The parties both stated that they would rest on the evidence presented at the January 5 and 6, 1993 hearing on the motion for temporary injunction. Neither wished to offer any additional evidence. A number of motions made by the respondents were overruled on the record. Both sides argued their case.

The court makes the same findings of fact and conclusions of law it made in its January 8, 1993 judgment entry on the temporary injunction. The Court is persuaded

by clear and convincing evidence as follows: That portion of the business operated by the respondents at 1425 Park Avenue West as a "video arcade" is a nuisance within the meaning of R.C. 3767.01(C) as a place upon which lewdness is conducted and permitted. The activity constituting the lewdness or nuisance--laying aside circumlocution--is a commercial business renting booths to members of the public to be used for masturbation. The rest of the findings and conclusions in the 1-8-93 entry are fully incorporated herein by reference. A copy of that entry is attached.

The relator requested that the entire store at 1425 Park Avenue West--including the front two-fifths of the store used as a book and video store--be closed as part of the nuisance. For the reasons stated in the attached entry, the Court is persuaded that it cannot close the front portion of

the store so long as appropriate precautions are taken to prevent transfer of any portion of the nuisance to the front part of the store.

Based on the respondent's admission that Video Studio, Inc. was the owner and operator of the video arcade business, the Court finds that it is a person maintaining a nuisance against which the $300 tax provided in R.C. 3767.08 should be imposed.

It is therefore ordered and adjudged:

1. Pursuant to R.C. 3767(D), the respondents Video Visions, Inc., Video Studios, Inc., Facit Properties, Inc., Robert E. Rice, Wendy K. Dick, Tim Bush and Phillip Casper ("Respondents" herein) and any other persons are permanently enjoined from maintaining this video booth nuisance at 1425 Park Avenue West in Mansfield, Ohio. The Respondents are permanently enjoined from

maintaining the same type of nuisance elsewhere.

2. Pursuant to R.C. 3767.06(A), all personal property and contents of the video arcade portion of the building (the rear room which encompasses approximately 3/5 of the store) at 1425 Park Avenue West (called "Video Arcade" herein) shall be removed for safekeeping and sale by the Richland County Sheriff or the Mansfield Police to a place designated by the City Law Director, Robert L. Konstam. This personal property and contents have previously been inventoried pursuant to this court's order in this case.

Mr. Konstam shall advise the appropriate law enforcement officials of this order. This personal property and contents shall be sold, without appraisal, at a public auction to the highest bidder for cash pursuant to R.C. 3767.06(A). The auction of this property shall not be held earlier

than 10 days after the date of this entry and only after the holder of any liens on this property are notified of the contents of this entry. If the relator contends that it is inappropriate for any of this property to be sold, he shall file the appropriate request and justification for an alternative disposition.

3. NOTICE: General Electric Capital Corporation, P.O. Box 17990F, Jacksonville, Florida 32245 may claim some interest in this personal property. That corporation is hereby notified by copy of this entry that: R.C. 3767.06(B) provides that owners of unsold property personal property or contents seized under this nuisance statute shall appear and claim the personal property or contents within 10 days after this order of abatement is issued and prove to the satisfaction of the court its lack of any actual knowledge of the use of the

personal property or contents in the conduct of the nuisance and that with reasonable care and diligence they could not have known of that use.

4. Pursuant to R.C. 3767.06(D), all proceeds from the sale of the personal property and contents ordered above shall be applied first to the payment of the costs incurred in prosecution of this action and the costs associated with the abatement and sale ordered above. Pursuant to that same section, any proceeds remaining from the sale after payments of these costs shall be deposited into the City of Mansfield treasury and credited to its general fund. If the Relator contends he is entitled to reasonable attorney fees or other litigation expenses as part of the costs described above, he shall promptly request and justify such fees and expense.

5. Pursuant to R.C. 3767.06(A), the Video Arcade portion of the building at 1425 Park Avenue West is closed against its use for any purpose until March 10, 1994 unless sooner released, except that persons may pass through the room to the rear exit of the building in the event of an actual fire or other emergency. Respondents may keep the remainder of the store open to the public during this period. The Respondents may setup no more than one video viewing facility in this front portion of the store, and it must be placed in an open area of the store within clear sight of the sales counter. Any persons (other than a clerk of the store) using that video viewing facility may not be charged for its use and shall be observed at all times during that use by a clerk of the store.

6. Pursuant to R.C. 3767.08, a $300 tax is hereby imposed on respondent Video Stu-

dios, Inc. Whether any additional nuisance taxes will be imposed will be determined only after briefing by the parties. Pursuant to R.C. 3767.08, this tax shall be applied to pay any deficiency in the costs of the action and abatement, after application of the proceeds of the sale of personal property. Pursuant to R.C. 3767.11(B), any remainder of the tax shall be paid to the county treasurer.

7. Any remaining costs are assessed against the Respondents jointly and severally.

8. Attorney Michael Murray shall communicate the contents of this order to the respondents.

9. If any additional order of service is desired by either counsel beyond that provided in this entry, they shall immediately advise the court.

10. The Clerk shall serve copies of this entry on attorneys Robert L. Konstam and J. Michael Murray, advising them of the date it was entered on the Court's journal. The Clerk shall further send a copy of this entry by certified mail, return receipt requested, to General Electric Capital Corporation, P.O. Box 17990F, Jacksonville, Florida 32245.

/s/ James DeWeese
James DeWeese, Judge

IN THE COMMON PLEAS COURT
OF RICHLAND COUNTY, OHIO

STATE OF OHIO, ex rel.: Robert L. Konstam,	:	Case no. 92-751-D
Plaintiffs	:	JUDGMENT ENTRY AND TEMPORARY INJUNCTION
v.		
Video Visions, Inc., et al.,	:	
Defendants	:	(Filed January 8, 1993)

On January 5, 1993, this case came on for hearing on the Relator's motion for a temporary injunction to abate an alleged nuisance at the Video Visions store located at 1425 Park Avenue West in Mansfield, Ohio. Evidence was heard on January 5 and 6, 1993, and the stenotype reporter was Karen Grant. A written motion to dismiss filed by respondents on January 5, 1993 was voluntarily dismissed on the record at the hearing prior to calling the first witness. Relator is the Law Director of the City of

Mansfield and is authorized by R.C. §3767.03 to bring this action.

The Video Visions store sells sexually explicit books, magazines, videos and other items in two rooms located in the front two-fifths of the store. The rear three-fifths of the store is a "video arcade" located in a room separated by a wall and closed door from the rest of the store. In this room are 22 separate booths in which members of the public can watch short portions of sexually explicit movies by placing 25¢ tokens in the coin slots in the booths. There are four groups of 8 to 10 movies each with various sexual orientations (e.g. heterosexual, homosexual, multiple partners, bondage, etc.) listed on color-coded boards. One of the four groups of movies is available in each booth, and each booth is color-coded to match the corresponding listing board. Two

additional booths can be used to watch movies picked out in the front portions of the store.

The real property in which the store is located is owned by respondent Facit Properties, Inc. The store is operated by respondents Video Studio, Inc. and/or Video Visions, Inc. The remaining respondents are allegedly sales clerks employed in the store.

The Court is persuaded by clear and convincing evidence as follows: That portions of the business operated by the respondents at 1425 Park Avenue West as a "video arcade" is a nuisance within the meaning of R.C. §3767.01(C) as a place upon which lewdness is conducted and permitted. The activity constituting the lewdness or nuisance--laying aside circumlocution--is a commercial business renting booths to mem-

bers of the public to be used for masturbation.

Ohio's nuisance statute requires that in order to obtain an abatement order, the relator must prove by clear and convincing evidence that the respondent has knowledge of, and either acquiesced to or participated in the nuisance. R.C. §3767.05; State ex rel. Freeman v. Pierce, 61 Ohio App.3d 663, 670-71 (Montgomery Co. App. 1991); State ex rel. Pizza v. Tom S.A. Inc., 68 Ohio Misc. 19, 23-24 (Lucas Co. C.P. 1981).

The court further finds by clear and convincing evidence that the respondents had knowledge of and acquiesced in the use of the video booths for a fee for masturbation purposes. That finding is based on two grounds.

First, the video arcade was specifically designed to facilitate that use. The booths

are provided with a wide variety of sexually explicit films. The booths are placed in the most remote part of the store out of sight of any store employees. The room in which the booths are located is separated from the rest of the store by a door with a warning bell. That bell sounds anytime the door is opened, to warn of the approach of another person. Each booth has a door* which can be locked from the inside. Access to the booths is restricted to those who pay at least $2.00 to get in. For $2.00 worth of tokens, the customer can watch approximately 5 minutes of the sexually explicit films. If the customer came to the store just to watch a movie, he would

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* Respondents' counsel asserts (although evidence was not presented) that the doors have been taken off the booths since this case was filed. Because of the other design attributes of the arcade, however, the court is not persuaded that removal of the doors will abate the nuisance.

need $22.50 to watch one hour of the film. Twenty-five cents buys only 40 seconds of viewing.

Second and most importantly, evidence of that use for masturbation was open and obvious to any respondent on the premises. The respondents had to know of that continued use unless they were determined not to know. Police officers who visited the arcade briefly during the months of October, November and December 1992 found evidence on each visit of masturbation taking place in the booths. They saw puddles of what appeared to be semen on the floor and soiled kleenexes and paper towels. They also found what appeared to be dried semen stains on all parts of the booths. Forensic testing confirmed that most of the kleenexes and swabbed liquid the officers collected from the booths contained semen.

Officers visited the arcade every day during one four day period from October 26 through October 29, 1992. On each day, they saw obvious evidence of the use of the booths for masturbation. On October 27, 1992, officers collected samples from 8 of the 22 booths, and 7 of the samples were confirmed to be, or to contain semen. They also found a used condom in one booth. Inspections and collection of evidence by undercover officers on November 11, 1992 and December 15, 1992, confirmed the continued existence of the same conditions in the booths.

The treatment of the video arcade as a nuisance under R.C. §3767.01 is also justified by public health considerations. See State ex rel. Rear Door Bookstore, 63 Ohio St.3d 354, 360 (1992). It is now common knowledge that the disease AIDs is transmitted among the population through bodily

fluids--most commonly blood and semen. Providing a place for customers to masturbate where other customers can come into contact with the semen, because of the prevailing unsanitary conditions, creates a public health risk. The practice deserves to be abated as a health nuisance.

The respondents argue at length that this nuisance action is a pretext to suppress books, magazines and videos which have not been demonstrated to be obscene, and therefore outside First Amendment protection. Respondents offered evidence that members of city council, the mayor and others have expressed a purpose to suppress sexually explicit materials in Mansfield. Respondents argue that the city law director seeks to use this nuisance statute to close their bookstore as part of the city's crusade, without demonstrating the material to be obscene. The U.S. Supreme Court has

warned Courts to be vigilant against such pretextual use of nuisance statutes to violate First Amendment rights. Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (fn.4) and 708.

Whatever the city's ultimate goals, they do not affect the fact that a nuisance has been proven in this case. Furthermore, this court, in the exercise of its equitable jurisdiction to enjoin the nuisance, can tailor its order to abate only the nuisance which was demonstrated. It is not necessary to close the entire store to temporarily abate the nuisance nor to sweep too broadly against material not demonstrated to be outside First Amendment protection.

It is therefore ordered and adjudged that, until final resolution of this case:

1. The temporary restraining order entered in this case on December 29, 1992

is continued. The respondents are all ordered not to remove or interfere with the personal property or contents of the premises at 1425 Park Avenue West until further order of this court.

2. A temporary injunction against the nuisance is issued and the respondents are ordered:

a. To close the video arcade and the room in which it is situated to all members of the public, except to permit them to pass through the room to the rear exit of the building in the event of an actual fire or other emergency;

b. To prevent any property from being removed from the video arcade or the room in which the video arcade is situated;

c. To prevent the use by a member of the public of any video booth or other video viewing facility on the

premises, with one exception: the defendants may set up one video viewing facility in an open area of the store within sight of the sales counter. Any customer using that video viewing facility may not be charged for its use and must be observed at all times during that use by a clerk of the store; and

d. To prevent the use of any part of the premises for masturbation purposes by members of the public.

3. The respondents may keep the remainder of the Video Visions store open to the public and may continue to sell and rent magazines, books and videos to the public in the ordinary course of their business.

4. Attorney Michael Murray shall communicate the contents of this order to the respondents.

5. If any additional order or service is desired by either counsel beyond that provided in this entry, they shall immediately advise the court.

6. NOTICE OF TRIAL:

This case is set for hearing on the permanent injunction and remaining issues in the case on Thursday, March 4, 1993 at 9:00 a.m.

/s/ James DeWeese
James DeWeese, Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of this "Judgment Entry" was mailed by regular U.S. mail this 8th day of January, 1993 to the following:

Robert Konstam
Law Director
City of Mansfield
30 N. Diamond Street
Mansfield, Ohio 44902

J. Michael Murray
Berkman, Gordon, Murray, Palda & DeVan
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113

/s/ Hilda Euderle
Secretary to Judge DeWeese

IN THE COMMON PLEAS COURT OF
RICHLAND COUNTY, OHIO
GENERAL DIVISION

CITY OF MANSFIELD, OHIO, ex rel. ROBERT L. KONSTAM	:	CASE NO.
Plaintiff	:	JUDGE:
vs.	:	(Filed December 29, 1992)
VIDEO VISIONS, INC., et al.,	:	
Defendants	:	

TEMPORARY RESTRAINING ORDER

Based upon the allegations contained in the verified complaint filed by the Plaintiff, and pursuant to § 3767.04 of the Ohio Revised Code, this Court makes the following findings and orders:

The Court finds that immediate and irreparable injury will result to the Plaintiff if the personal property or contents of the premises at 1425 Park Avenue West, Mansfield, Richland County, Ohio are altered, removed, or destroyed, as such are

essential evidence of the alleged nuisance as stated in the verified complaint.

The orders contained herein are granted without notice, as Chapter 3767 of the Ohio Revised Code is a special statutory proceeding in which notice of the ex parte restraining order is not required.

IT IS HEREBY ORDERED that neither the Defendants herein, nor any other person, shall remove, or in any manner interfere with, the personal property or contents of the named premises; all of which are located within Richland County, Ohio until the decision of this Court granting or refusing Plaintiff's application for a temporary injunction, and until further order of this Court thereon.

IT IS FURTHER ORDERED that the Richland County Sheriff shall serve a certified copy of this order with any person in charge of said premises as set forth herein, or re-

siding therein, and shall post certified copies of this order in conspicuous places at or upon one or more of the principle doors or entrances to such place.

IT IS FURTHER ORDERED that the Richland County Sheriff shall forthwith make and return into this Court an inventory of the personal property and contents situated in and used in conducting and maintaining the premises named herein.

The Court further **ORDERS** the contents of the premises that constitute essential evidence of the alleged nuisance be photographed and/or scientifically tested.

WHILE THIS ORDER REMAINS IN FORCE, ANY VIOLATION OF THIS ORDER, OR MUTILATION OR REMOVAL OF THIS ORDER, WHEN POSTED IS A CONTEMPT OF COURT.

/s/ James DeWeese
JUDGE

APPROVED:

/s/ Robert L. Konstam
Robert L. Konstam, #0008451
Director of Law
City of Mansfield, Ohio

Attorney for Plaintiff

CONSTITUTION OF THE UNITED STATES

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Revised Code
(Page's 1988)

§ 3767.01 Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

Ohio Revised Code
(Page's 1988)

§ 3767.02 Nuisance.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

§ 3767.03 Abatement of nuisance; bond.

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

§ 3767.04 Procedure in injunction action.

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make

and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such

order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under

this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

§ 3767.05 Priority of action; evidence; dismissal of citizen's complaint; costs; permanent injunction.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the

prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and another person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

Ohio Revised Code
(Page's Supp. 1993)

§ 3767.06 Order of abatement; removal of personal property and contents; attorney general nuisance abatement fund.

If the existence of a nuisance is admitted or established in the civil action provided for in section 3767.03 of the Revised Code or in a criminal action, an order of abatement shall be included in the judgment entry under division (D) of sections 3767.05 of the Revised Code. The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting or maintaining the nuisance and not already released under authority of the court as provided in division (C) of section 3767.04 of the Revised Code and shall direct that the personal property or contents that belong to the defendants notified or appearing to be sold, without appraisal, at a public auction to the highest bidder for cash. The order shall also require the renewal for one year of any bond furnished by the owner of the real property under section 3767.04 of the Revised Code; if a bond was not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction; or, if a closing order was then issued, shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released

under bond may appear and obtain a release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this division shall not release it from any judgment, lien, penalty, or liability to which it may be subject.

(B) Owners of unsold personal property or contents seized pursuant to division (A) of this section shall appear and claim the personal property or contents within ten days after the order of abatement is issued and prove to the satisfaction of the court their lack of any actual knowledge of the use of the personal property or contents in the conduct or maintenance of the nuisance and that with reasonable care and diligence they could not have known of that use. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place where the nuisance is found to exist. If an owner establishes the lack of actual or constructive knowledge of the use of his personal property or contents in the conduct or maintenance of the nuisance, the unsold personal property and contents shall be delivered to the owner. If an owner does not so establish, the personal property or contents shall be sold or otherwise disposed of as provided in division (A) of this section. For removing and selling the personal property and contents, the officer involved shall be entitled to charge and receive the same fees as he would for levying upon and selling similar property on execution. For closing the place where the nuisance is found to exist and keeping

it closed, a reasonable sum shall be allowed by the court.

(C) There is hereby established in the state treasury the attorney general nuisance abatement fund. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, all proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted by the attorney general under sections 3767.03 to 3767.11 of the Revised Code shall be deposited into the state treasury and credited to the fund. The attorney general shall use the fund solely to defray expenses and costs associated with those types of civil actions.

(D) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a village solicitor, city director of law, or other similar chief legal officer of a municipal corporation initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the city or village treasury and credited to the general fund.

(E) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a prosecuting attorney initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the county treasury and credited to the general fund.

(F) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a person who is a citizen of the county where the nuisance is found to exist initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale including but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the county treasury and credited to the general fund.

BILL #92-301 ORDINANCE #_____

BY: MRS. BROOK

Amending Section 739.01 (Definitions) of Chapter 739, Places of Public Entertainment and enacting Section 739.07, Video Booth Requirements, of the Mansfield Codified Ordinances of 1983, as amended, to regulate video booths.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MANSFIELD, STATE OF OHIO:

SECTION 1. That Section 739.01 of Chapter 739, Places of Public Entertainment, of the Mansfield Codified Ordinances of 1983, as amended, be and the same is hereby amended to read as follows:

"739.01 **DEFINITIONS.**

(a) "Place of public entertainment" means every theater, moving picture theater, drive-in theater, concert hall, auditorium, stadium, ball park, dance hall, dance pavilion or other building or place of entertainment charging a fee for admission and for which a license is not required elsewhere in this Business Regulation Code.

(b) "Video Booth" means an enclosure or area in which a film or videotape or reproduction viewing service or device is available for the use or entertainment of not more than five (5) persons patronizing the place of business where such booth is located.

SECTION 2. That Section 739.07 of the Mansfield Codified Ordinances of 1983, as amended, be, and the same is hereby, enacted to read as follows:

"739.07 VIDEO BOOTH REQUIREMENTS."

(a) Video booths and places of business containing them shall be open to official inspection as provided in Section 739.04.

(b) Any video booth containing film or video or reproduction viewing devices shall comply with the requirements of subsection (c) herein if the material exhibited by the devices depicts any of the following:

(1) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
(2) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
(3) masturbation, actual or simulated; or
(4) bodily excretory functions.

(c) Each and every viewing booth for film video or other device shall comply with all of the following:

(1) the interior of the booth must be visible from a well-lighted open and continuous main aisle;
(2) Not be obscured by any door, screen, curtain or other material;
(3) All side and rear walls must be without holes or openings;

(4) Shall not be occupied by more than one person at a time; and

(5) Be illuminated by a light bulb of no less than 25 watts.

(d) No owner, operator, employee or agent of a place of business containing a video booth shall violate this Section or allow or permit a violation thereof to occur.

(e) No patron or customer or visitor of a place of business containing a video booth shall violate division (b)(4) above.

(f) Whoever violates this Section is guilty of a misdemeanor of the first degree.

SECTION 3. That this measure shall take effect and be in force and after the earliest time allowed by law, after its passage and approval by the Mayor.

PASSED 15 December, 1992

SIGNED /s/ Paul Delianides
President of Council

ATTEST /s/ Lisa Kovinchick
Clerk of Council

APPROVED /s/ Charles H. Scott, Jr.
Mayor

APPROVED AS TO FORM: Robert L. Konstam
Law Director
City of Mansfield, OH

*Publication required

BILL #92-233 RESOLUTION #92 229

BY: ALL MEMBERS OF COUNCIL

A Resolution by Council to support that aggressive investigation and legal action taken by the Mansfield Police Department and the Director of Law against the sale of "hard-core" pornographic materials in the City of Mansfield which are "obscene" by definitions set forth in decisions handed down by the United States Supreme Court and the Ohio Revised Code.

WHEREAS, the United States Supreme Court under guidelines commonly known as the "Miller test" allows regulation of certain materials which are "obscene", and

WHEREAS, there are presently available, for sale, in commercial establishments in the City of Mansfield "hard-core" pornographic materials depicting sexual conduct as defined and prohibited in the Ohio Revised Code, which "hard-core" pornographic materials henceforth be described herein as "materials", and

WHEREAS, this Council believes as follows:

1. That the average person in our City, applying contemporary community standards, would find that the dominant theme of these "materials", taken as a whole, appeals to the prurient interest, and further

2. That the average person in our City, applying contemporary community standards, would find that the

"materials" depicts sexual conduct as defined in the Ohio Revised Code in a patently offensive way, and further

3. That these materials, taken as a whole, lack any serious literary, artistic, political, or social value.

NOW THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MANSFIELD, STATE OF OHIO:

SECTION 1. That the Chief of Police shall hereby be requested to fully and thoroughly investigate the sale of these "materials" in our community and to present such investigation to the Director of Law for his review.

SECTION 2. That the Director of Law be, and he is hereby, requested to zealously pursue, either civilly or criminally, the sale of these materials in our community which, in his judgment, are in violation of the law.

SECTION 3. That the Director of Law be, and he is hereby, empowered and authorized by this Council to prosecute in the name of the City of Mansfield, Ohio, such civil actions either in nuisance, declaratory judgment, or other as he deems necessary in his judgment to carry out the expression of intent of this Council set forth in this Resolution.

SECTION 4. That this measure take effect and be in force and after the earliest time allowed by law, after its passage and approval by the Mayor.

PASSED 6 October, 1992

SIGNED /s/ Paul Delianides
President of Council

ATTEST /s/ Lisa Kovinchick
Clerk of Council

APPROVED /s/ Charles H. Scott, Jr.
Mayor

APPROVED AS TO FORM: Robert L. Konstam
Law Director
City of Mansfield, OH

(2)

Supreme Court, U.S.
FILED
JAN 27 1995
OFFICE OF THE CLERK

No. 94-1147

In The

Supreme Court of the United States

October Term, 1994

VIDEO VISIONS, INC.; VIDEO STUDIO, INC.; FACIT PROPERTIES, INC.,

Petitioners,

vs.

STATE OF OHIO, EX REL. ROBERT L. KONSTAM,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Is a state statute which requires the closure of premises where a nuisance is found to exist and forfeiture of personal property used in the nuisance, unconstitutional as applied under the First and Fourteenth Amendments when the statute is used by a municipality to padlock a video arcade situated in a bookstore when it was proven by clear and convincing evidence that masturbation was occurring in the video arcade and the bookstore was not closed and the video viewing was allowed to relocate to an area of the store in view of the sales counter?

II. Where it is alleged that an action under such a nuisance statute is being prosecuted by a municipality as a pretext for closing a bookstore and video arcade because of the sexually explicit but constitutionally protected expression offered there, do the First and Fourteenth Amendments require that such a demonstration of pretext be recognized as a complete affirmative defense to the action or rather is it more properly characterized as an element of selective prosecution as indicated in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)?

III. In such a case, do the First and Fourteenth Amendments, at a minimum, require that the remedy ordered to abate the nuisance be less restrictive than closing the booths situated in the back of the bookstore where it was found that masturbation was taking place and forfeiture of the personalty in the arcade in order to comply with *United States v. O'Brien*, 391 U.S. 367 (1968)?

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No. 94-1147

In The

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October Term, 1994

VIDEO VISIONS, INC.; VIDEO STUDIO, INC.; FACIT PROPERTIES, INC.,

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vs.

STATE OF OHIO, EX REL. ROBERT L. KONSTAM,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent Robert L. Konstam respectfully requests that the Court deny the Petition for a Writ of Certiorari submitted by the Petitioners.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioners' identification as to Opinions below, Jurisdiction of the Court and Statutory Provisions Involved.

STATEMENT OF THE CASE

A complaint was filed by Realtor, Robert L. Konstam, Law Director of the City of Mansfield, Ohio, alleging Video Visions, et al. to be maintaining a nuisance and seeking abatement, injunctive relief, forfeiture, and a tax, all as provided for in Chapter 3767 of the Ohio Revised Code (hereinafter O.R.C.).

Video Visions, et al. were found to be maintaining a nuisance within the meaning of O.R.C. § 3767.01(c), a place where lewdness is conducted. As a matter of fact the court found by clear and convincing evidence respondents had knowledge of and acquiesced in the use of the video booths for a fee for masturbation purposes because the booths were designed to facilitate such use by virtue of their remote placement in the video arcade, their lack of visibility to store employees and the existence of a warning bell warning occupants of the booth area of an arrival.

The trial court found a person who came to watch a movie would have to invest $22.50 in order to view one hour of a film. Officers visited the arcade every day during one four-day period from October 26 through October 29, 1992. On each day, they saw obvious evidence of the use of the booths for masturbation. On October 27, 1992 officers collected samples from 8 of the 22 booths, and 7 of the samples were confirmed to be, or to contain semen. They also found a used condom in one booth. Officers observations included puddles of what appeared to be semen on the floor and soiled kleenexes and paper

towels. The trial court found that respondents had to know that the booths were used for masturbation purposes unless they were determined not to know. (Petitioners' Appendix [hereinafter "App."] at A47-A50).

Since masturbation in public is unlawful sexual conduct not entitled to First Amendment protection, the trial court proceeded to abate the nuisance.

It is important to note that the trial court's permanent injunction and order abating the nuisance did not close the bookstore and it even allowed them to relocate a video booth to an open area of the store within clear view of the sales counter. (App. A41).

Petitioners appealed the trial court's judgment to the Court of Appeals for Richland County, Ohio, Fifth Appellate District, which affirmed the trial court in all respects, except concerning the charging of customers for use of the relocated video booth and the judgment against individually named defendants. (App. A28). Petitioners further appealed to the Ohio Supreme Court which dismissed their appeal for want of a substantial constitutional question. (App. A1).

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari should be denied because Petitioners have not established any basis for review by this court.

Masturbating in a video arcade located in the rear of a bookstore is not expressive conduct which is entitled to First Amendment protection. The closing of the video

arcade in the rear of the bookstore and its relocation to the front of the premises does not constitute prior restraint on free speech. The bookstore itself was not closed down.

Secondly, O.R.C. Chapter 3767 was constitutionally applied to abate the nuisance described. The allegation of pretext involving the bringing of the nuisance complaint is not a complete defense to the action and does not obscure the fact that the existence of a nuisance was proven.

Lastly, the remedy fashioned by the trial court was narrowly drawn to abate the illegal sexual activity of Petitioners' business while not interfering with the right to continue selling sexually explicit books, magazines and videos.

Ohio law was constitutionally applied resulting in a balanced and constitutional remedy that abated the nuisance.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. CHAPTER 3767 OF THE OHIO REVISED CODE WAS CONSTITUTIONALLY APPLIED TO ABATE A NUISANCE IN WHICH A BOOKSTORE ENGAGED IN THE BUSINESS PRACTICE OF RENTING BOOTHS TO MEMBERS OF THE PUBLIC TO BE USED FOR MASTURBATION.

Petitioners acknowledge the issue of pretext referred to in passing by Justice O'Conner and in slightly more detail by Chief Justice Berger in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In that case there was no assertion that the closure of the bookstore was sought under a public health nuisance statute as a pretext for the suppression of First Amendments protected materials. *Id.* at 708.

Contrary to Petitioners' assertion, Chief Justice Berger and the plurality did not recognize pretext as a defense, rather they recognized pretext as an element of the defense of selective prosecution. *Id.* In the context of selective prosecution the issue of pretext makes more sense because it does not distinguish between a community which opposes sexually explicit material and one which does not in determining whether or not a community may avail itself of the abatement procedures pertaining to a public health nuisance. Petitioners maintain that it was unlawful for Respondent to proceed with an abatement action despite the existence of a recognized nuisance because, separate and apart from such action, criminal prosecution for pandering obscenity had been brought against employees and the store, outside expertise had been sought, and/or public comment had been

made politically in opposition to the sale of hard-core pornographic materials within the City of Mansfield.

Petitioners assert that those factors, even though they were unrelated to the merits of the nuisance action, precludes the municipality from bringing an abatement proceeding pursuant to O.R.C. Chapter 3767. Respondent respectfully suggests that the more reasoned view is that taken by the Trial Court, making sure that there is evidence to support that a nuisance exists and narrowly tailoring its remedy to abate the nuisance.

The trial court found, by clear and convincing evidence that masturbation was taking place in the video booths in the rear of the bookstore, based upon the results of undercover operations conducted by Mansfield Police including the physical evidence, i.e. the presence of seminal fluid on the walls and floor of the booths, along with soiled paper towels, tissues and a used condom. (App. A49-A50).

The trial court applied Ohio's nuisance statute and found that those portions of the business where masturbation was occurring constituted a nuisance under O.R.C. § 3767.01(1) as a place upon which lewdness is conducted and permitted. The court proceeded to abate that nuisance by closing only the video arcade portion of the bookstore. The bookstore itself remains open to this day and it continues to sell what are described as sexually explicit books, magazines and videos. No First Amendment rights were abridged here. Indeed, First Amendment rights are not even implicated. As Judge Gwin noted "It is well-settled that masturbation, fondling, fellatio, and solicitation of prostitution in an adult bookstore

'manifests absolutely no element of protected expression' " (App. A13). *citing, Arcara,* 478 U.S. at 705.

II. PROOF OF PRETEXT IS NOT A COMPLETE DEFENSE TO AN ACTION INSTITUTED PURSUANT TO CHAPTER 3767 OF THE OHIO REVISED CODE. RATHER, IT IS AN ELEMENT OF THE DEFENSE OF SELECTIVE PROSECUTION, WHICH COULD NOT BE PROVEN BY PETITIONERS.

In *Arcara,* the Court did not recognize pretext as a complete defense to a nuisance complaint. Rather pretext is referred to as an element of the defense of selective prosecution. "Were respondents able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution. *See, Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L. Ed.2d 547 (1985); *Arcara.* Selective prosecution is the defense for which the appropriate remedy would be dismissal.

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometime referred to as 'intentional and purposeful

discrimination.' " *State v. Flynt*, 63 Ohio St. 2d 132, 134 (1980), *quoting, United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *See also, State v. Freeman*, 20 Ohio St. 3d 55 (1985).

The first part of the two-prong test announced in *Flynt* describes the pretext, that being the singling out of one defendant to the exclusion of others similarly situated. There is no evidence on the record which would suggest that others similarly situated have not generally been proceeded against. There is no evidence of other places within the City of Mansfield where public masturbation is occurring.

The Petitioners would have the court create a new defense entitled PRETEXT. The practical affect of Petitioners' assertion would require the courts to look beyond the actual merits of an action and attempt to determine whether or not the action is driven by some improper or misguided intent.

In this case, the trial court found that a nuisance existed, irrespective of any alleged, additional motivation to pursue this matter that Respondent might have had. "The mere existence of a potential discriminatory purpose is insufficient to show that such purpose motivates the selection of [Petitioners] for prosecution." *Freeman*, 20 Ohio St. 3d at 58 (1985). The Judge acted accordingly to abate the nuisance under state law.

Despite Petitioners' attempt to hide behind the First Amendment to somehow justify the clear fact that masturbation was occurring in the video arcade portion of the bookstore, they cannot escape the simple truth that the First Amendment cannot be used to justify "obviously

unlawful public sexual conduct." *Paris Adult Theater, Inc. v. Slaton*, 413 U.S. 49, 67 (1973). "First Amendment values may not be involved by merely linking the words 'sex' and 'books'." *Arcara*, 478 U.S. at 705.

III. THE REMEDY FASHIONED BY THE TRIAL COURT AS MODIFIED BY THE APPELLATE COURT WAS NARROWLY TAILORED TO ABATE THE NUISANCE THAT WAS FOUND TO EXIST I.E., CUSTOMERS MASTURBATING IN THE VIDEO ARCADE PORTION OF VIDEO VISIONS.

The trial court did narrowly tailor its remedy to abate the nuisance even though it was not necessary. Judge DeWeese in his Temporary Injunction and Order stated:

> The U.S. Supreme Court has warned Courts to be vigilant against such pretextual use of nuisance statutes to violate First Amendment rights. *Arcara*, 478 U.S. 697, 707 (fn. 4) and 708.
>
> Whatever the city's ultimate goals, they do not affect the fact that a nuisance has been proven in this case. Furthermore, this court, in the exercise of its equitable jurisdiction to enjoin the nuisance, can tailor its order to abate only the nuisance which was demonstrated. It is not necessary to close the entire store to temporarily abate the nuisance nor to sweep too broadly against material not demonstrated to be outside First Amendment protection. (App. A52).

While Petitioners argue that the Court went too far in closing the video area because Video Visions was allegedly complying with the City's open-door Ordinance, the court reasoned as follows:

> Respondents' counsel asserts (although evidence was not presented) that the doors have been taken off the booths since this case was filed. Because of the other design attributes of the arcade, however, the court is not persuaded that removal of the doors will abate the nuisance. (App. A48).

Hence the Court did apply the fourth-prong of the test in *United States v. O'Brien*, 391 U.S. 367 (1968) fashioning the "least restrictive" means to abate the nuisance while safeguarding alleged First Amendment freedoms even though this Court has already found in *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St. 3d 354, 362 (1992), as did the Supreme Court in *Arcara*, 478 U.S. 697 that compliance with the fourth-prong of the *O'Brien* test was not required because *O'Brien* is not relevant "to a statute directed at imposing sanctions on non-expressive activity." *Arcara*, 478 U.S. at 707. Masturbation in public is unlawful conduct "having nothing to do with books or other expressive activity." *Id.*; *See also, State ex rel. Roszmann v. Lion's Den*, 89 Ohio App.3d 775 (1993).

As Judge Gwin pointed out, Video Visions was not ordered to close down its entire business. They continue to sell and rent sexually explicit books, videos and magazines. (App. A23-A24). They were not required to remove their video booths, rather they were permitted to set up a booth in the front portion of the store in view of the sales counter. (App. A11).

Judge Gwin held and Respondent asserts, that the remedy described was "the most effective means of abating the nuisance and has *little effect* on [Petitioners'] First

Amendment freedoms." *O'Brien, supra.* (App. A24). (Emphasis added).

IV. CONCLUSION

For all the foregoing reasons, Respondent, Robert L. Konstam, respectfully requests this Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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